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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 14

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD EDUCATION SOCIETY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

HENRY WARD BEEB,
Counsel for Petitioner.

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PETITION FOR REHEARING.

Now come the respondents and present this, their petition for a rehearing of the above entitled cause, and in support thereof respectfully show the following, which respondents believe are substantial errors of this Court, as shown from its opinion:

I.

The Supreme Court has directed the enforcement of clauses one, three and seven of the Commission's order without evidence of disobedience and contrary to the due process of law provided by the terms of the statute.

II.

The Supreme Court improperly supported its interdiction of clauses one and three of the Commission's order because it believed them connected as parts of a plan with clauses two and six of the order. But clauses two and six had been affirmed below and were not before the Court since no appeal was, or could be taken from their affirmance.

III.

The lower court's modification of clause seven was proper in face of the Commission's contention at that time and in view of the state of the record. This Court's criticism and reversal of the modification appears to have been unnecessary and unjust to the Circuit Court.

IV.

The Supreme Court, respondents believe, erroneously found that clause eight of the order was supported by testimony.

V.

The Supreme Court, in reversing the lower court's ruling as to the individuals, respondents believe, overlooked the fact that the Commission's finding, that the new corporation was organized to evade any order that might be issued against the original corporation, was not based on any testimony.

I.

The Supreme Court Has Directed the Enforcement of Clauses One, Three and Seven of the Commission's Order Without Evidence of Disobedience and Contrary to the Due Process of Law Provided by the Terms of the Statute.

The Court in its opinion (82 L. Ed. 48, 50, 51) in directing that clauses 1, 3, and 7 of the Commission's desist order should be affirmed by the court below, also directed that these clauses be *enforced*. Respondents believe that this direction may have been inadvertently made, since in discussing the only other clause under review, clause 8, this Court merely reversed the lower court and said nothing as to *enforcement*. However, in thus ordering *enforcement* of the three aforementioned clauses, before there was *any* proof of violation of the Commission's cease and desist order, the Court apparently nullifies the relevant portions of Section 5 of the Federal Trade Commission Act, and overrules the decisions of several circuit courts of appeals, and limits the application of a decision of the Supreme Court in a case analogous in principle to the instant case.

The Commission in its application to the court below, prayed that the court (1), affirm its order and (2), decree its enforcement (R. X).

The relevant part of Section 5 of the Federal Trade Commission Act is as follows:

> "If such person, partnership, or corporation *fails* or *neglects* to obey such order of the Commission while the same is in effect, the Commission may apply to the circuit court of appeals of the United States, * * * for the enforcement of its order, * * *." (15 U. S. C., § 45.) [Italics supplied.]

The statute thus provides, as a condition precedent to the application by the Commission for the affirmance and enforcement of its order, that the cease and desist order

shall have been violated. The order must first be vitalized by the power of the Circuit Court of Appeals before enforcement can be considered.

The question of disobedience of a valid order is one of fact and since disobedience was put in issue by respondents in the instant case (R. XIII), each respondent is separately entitled to be given an opportunity to answer the Commission's proof of disobedience and to submit its own proof at a proper hearing. Such a hearing was provided for by the court below when it appointed the Commission as master to take testimony with regard to the portions of the order it affirmed (R. 495).

The court below in the case of *Federal Trade Commission* v. *Balme,* 23 F. (2d) 615, decided that, where the Commission seeks to *enforce* its order in a proceeding initiated by itself and an issue is raised as to the violation of the order, the Court must first determine whether there has been a violation of law. That, if the order does not represent a violation of law, the Circuit Court will dismiss the Commission's application and reverse the order. That, should the Court determine there has been a violation of law, it will affirm the order and then send the question as to disobedience of the order back to the Commission for testimony and findings as to the fact thereon. That enforcement will be decreed *only* if the Court is satisfied from these later findings of the Commission, made at the direction of the Circuit Court subsequent to its affirmance of the order, that the order was violated. To decree *enforcement,* where, as here, the respondents have asserted obedience and where there is no proof or finding in the record of disobedience of the order, is contrary to the clear mandate of the statute. The court below in the *Balme* case, *supra,* stated (p. 618):

> "Manifestly, it is very apparent that the question of violation of the Commission's order would not be

involved until a valid order was recognized by this court after having acquired jurisdiction. Therefore we must first examine the proceeding before the Commission and determine whether there has been a violation of the law. Until then, no good purpose can be served for determining disputed questions of fact as to a violation of the order. The statute does not impose any penalty for violation of the Commission's order, and the order is not binding until vitalized by the power of this court to punish for contempt, when the court shall have entered a decree affirming the order and commanding permanent obedience thereto, and it is not until the Commission presents a case of justifying the charge of violation that action will be taken to punish. It is then, and not until then, that the question of fact as to violation of order, becomes a proper issue to be determined by the court."

In *Federal Trade Commission* v. *Baltimore Paint & Color Works, Inc.*, 41 F. (2d) 474, the Circuit Court of Appeals for the Fourth Circuit, citing the *Balme* case (*supra*) said (p. 476):

"We agree with the conclusion of the Circuit Court of Appeals of the Second Circuit, in case of Federal Trade Commission *v.* Balme, *supra*.

"This court has no machinery for investigating or ascertaining the fact as to the compliance or noncompliance with an order of the Commission. The Commission has such machinery and is the proper body to pass upon that question.

"It is therefore the conclusion of the court that the order of the Federal Trade Commission, requiring the respondent, Baltimore Paint & Color Works, Inc., to cease and desist from certain practices found by the Commission to constitute unfair methods of competition, be, and the same is, affirmed. The question of the violation of the order, the enforcement of which is asked in the petition, is referred to the Federal Trade Commission, with opportunity for the respondent to

answer and submit proof, and with direction to the Commission to report its conclusions to this court."

Following this settled procedure, the court below in the case at bar, correctly refused to enforce the affirmed parts of the desist order but remanded the cause to the Federal Trade Commission as Special Master to report back to it whether the affirmed portions had been violated (R. 495). The Circuit Court thus accorded to respondents their statutory rights to a hearing on the question of disobedience.

To deprive respondents of their statutory rights to the hearing which must precede a decree of enforcement constitutes a denial of the due process of law provided by the statute. Such a decision by the Court is in serious conflict with *Morgan* v. *United States*, 298 U. S. 468, 477, where this Court held that a rate order by the Secretary of Agriculture, under the Packers and Stockyards Act of 1921 [1] was void because the requirement in the statute of a "full hearing" had been denied, and cited in support of its decision: *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274; *Florida* v. *United States*, 282 U. S. 194; *United States* v *Baltimore & O. R. Co.*, 293 U. S. 454.

The Supreme Court apparently further failed to note that the Commission did not seek from this Court the enforcement of its order. Although the Commission, in the petition for certiorari (pp. 11, 12), had first specified as error, the action of the court below in refusing to decree enforcement, in its brief to the Court, the Commission abandoned this as an error and, by the abandonment, in effect, conceded the propriety of the lower court's procedure. Indeed, the Commission's acquiescence is patent from the fact that contrary to its prayer to the court be-

[*Footnote*] [1] 42 Stat. at L. 159, 166, Chap. 64, § 310; U. S. C. A., Title 7, § 211.

low (R. X), the Commission here only asked that its desist order be affirmed (Comm.'s brief, p. 83). The Commission did not ask this Court to enforce the order because enforcement under the statute is unwarranted at this time.

It seems to us undebatable that had the court below affirmed the additional parts of the desist order now affirmed by this Court, it would not have decreed their enforcement, but would have demanded proof of their violation in accordance with the statute.

Since the record is void of any evidence or finding that any part of the Commission's order has been violated from the time it was entered in 1931, and, since *enforcement* of the order was not before this Court, *enforcement* is, at this time premature and has been improperly ordered.

To hold that *enforcement* shall *now* be decreed by the court below without a hearing in effect nullifies the statute. It is not believed that the Court intended to give such a drastic direction. A literal reading of the Court's opinion seems to leave no alternative.

Therefore, the direction to the Circuit Court of Appeals in the opinion should, respondents submit, be modified to eliminate the reference to *enforcement*. Otherwise, the result in the court below may be that some clauses of the order will have to be presently enforced (*i. e.*, 1, 3 and 7), without taking testimony as to whether they have been violated, while others (2, 4, 5, 6, 8, 9 and 10) are affirmed and await the finding of the Commission as Special Master on the question of disobedience before enforcement can be decreed. Such a result would be manifestly illogical, unjust and directly contrary to the mandate from Congress.

It is of the utmost importance to respondents that this matter be clarified, for although punishment for contempt cannot follow the violation of the Commission's order, a violation of a decree of the court commanding obedience subjects the transgressor to punishment as for a contempt.

II.

The Supreme Court Improperly Supported Its Interdiction of Clauses One and Three of the Commission's Order Because it Believed Them Connected as Parts of a Plan With Clauses Two and Six of the Order. But Clauses Two and Six Had Been Affirmed Below and Were Not Before the Court Since No Appeal Was or Could be Taken From Their Affirmance.

By reason of the Supreme Court's consideration of clauses two and six of the desist order in reversing the lower court's ruling which had held that the "free" representation of clauses one and three was not unfair, and the positive emphasis placed on them, the Court disregarded the substantial rights of respondents. Clauses two and six had been affirmed by the Court of Appeals and were not before the Court (R. 494). Respondents had taken no appeal from the rulings adverse to them. As a matter of law, no appeal was possible since the lower court had not rendered a final judgment as to the clauses affirmed, but had ordered that the cause be held in abeyance awaiting the further findings of the Commission (R. 495).

Furthermore, in the Commission's petition for the writ of certiorari, the sole basis of this Court's review, nothing was said as to clauses two and six. Review was there sought of the lower court's reversal of clauses one and three. The question presented concerned itself only with the issue of whether the "free on condition" representation prohibited in clauses one and three was, independently and by itself an unfair method of competition.

Notwithstanding that the lower court had ruled adversely to respondents in affirming clauses two and six, and that respondents had taken no appeal from this ruling, and despite the further fact that the petition, upon which the writ of certiorari was granted, is entirely devoid of any

reference to clauses two and six, the Court used clauses two and six as the basis for its decision condemning clauses one and three. Thus, the Court stated:

> "It is clear both from the findings of the Commission and the testimony upon which they rest, that the practices forbidden in clauses one, two, three and six are all tied together as parts of the same sales plan." 82 L. Ed. 48, 49.

It is inescapable from the foregoing that clauses one and three were held unfair by the court because, in its opinion, these clauses were tied together with clauses two and six. But, this Court was without power to consider the affirmed clauses two and six which had not been appealed and therefore could not be before the Court. The Commission itself, in its brief, admitted, at page 17 that:

> "To the extent that the Commission's order was affirmed by the court below, (*inter alia,* clauses two and six) it is, of course, not now before the court." (Parenthetic matter added.)

The Court apparently overlooked the fact that clauses two and six were not and could not be before them. It is submitted that the Court erred in employing these two paragraphs as an indispensable means to support its interdiction of clauses one and three. It thereby, in effect, amended the order of the Commission and condemned clauses one and three as part of a plan which was not before this Court, the court below or the Commission.

III.

The Lower Court's Modification of Clause Seven Was Proper in Face of the Commission's Contention at That Time and in View of the State of the Record. This Court's Criticism and Reversal of the Modifications Appears to Have Been Unnecessary and Unjust to the Circuit Court.

The Government in the court below, in its reply brief (p. 12) and in oral argument, contended, in support of clause seven, that to publish, as contributors to the revised work, the names of contributors to Aiton's Encyclopedia "was false and misleading and unauthorized", *even though the matter contributed by them was brought forward in the revised work.*

Obviously, this contention of the Government in the court below caused the Court to modify clause seven so that the order would not prevent respondents from representing a person, who contributed to the original, as a contributor to the revised publication.

After having caused this modification, the Government in its brief before the Supreme Court withdrew its said contention. It conceded to the contrary that clause seven did not prevent the representation of a person, as a contributor to the revised work, who had contributed to Aiton's Encyclopedia and some of whose material was carried forward to the revised work. However, the clause seven, as modified by the court below, was nothing more than the original clause embodying the concession later made in this Court by the Government.

So far, there was no cause shown for the criticism and reversal by the Supreme Court of the action of the Circuit Court in modifying clause seven of the desist order.

But, Mr. Justice Black, in the opinion of the Court, further says (82 L. Ed. 48, 51):

> "If no part of his contribution to Aiton's encyclopedia has been brought forward, he is not a contributor and should not be represented as such. * * * The decree of the court below modifying this clause is not in accordance with our conclusion, * * *."

This statement of the Court indicates that the Court believed there was evidence that persons who had contributed to Aiton's encyclopedia were represented as contributors to the revised work, although "no part of his contribution had been brought forward", and that the modified clause permits respondents to list, as contributors to the revised publication, the names of such original contributors to Aiton's encyclopedia, whose material was not carried over to the revised work.

There was no basis for such belief on the part of the Court. There was no evidence at all in the record before the court below showing that all the material furnished by any of the writer's to Aiton's encyclopedia was omitted from the revised publication with which their names were associated.

In modifying clause seven, it would have been improper for the court below to have provided for the restraint of any practice that had never been shown by evidence to have been employed. In modifying clause seven the Circuit Court was justified in excepting from the prohibition the contributors to Aiton's encyclopedia.

The reversal of the Circuit Court's modification of clause seven appears to have been ill considered and unnecessary and contrary to the rule followed by this Court to decide moot questions. The lower court's modification was proper and necessary and should not have been reversed by this Court.

IV.

The Supreme Court, Respondents Believe, Erroneously Found That Clause Eight of the Order Was Supported by Testimony.

The Supreme Court in its opinion states of the eighth clause:

> "We are convinced that the Commission's findings of fact justified this clause of the order and that the testimony supports these findings." (82 L. Ed. 48, 51.)

The testimony shows that each of the men and the sole woman referred to in the finding of the Commission, which is quoted in a footnote to the Supreme Court's opinion, actually gave testimonials for the Standard Reference Work, the same publication as the New Standard Encyclopedia, the works differing only in name (R. 466).

The Commission found that the New Standard Encyclopedia "is the old Standard Reference Work revised" (R. 74).

This finding of the Commission is in the same numbered finding from which the Court quotes in the footnote of its opinion (82 L. Ed. 48, 51).

The Circuit Court said of these testimonials that there was no proof offered that these testimonials were not authorized, saying (R. 490):

> "For the eighth, which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; and we are referred to none * * *."

Since, therefore, the only testimony of unauthorized testimonials are of those which were used as above for the New Standard Encyclopedia found by the Commission to be the

Standard Reference Work revised when they had been given for the latter work, the Circuit Court's opinion and conclusion that the Commission's findings are unsupported by any testimony at all appears to be correct. We submit that the Supreme Court was in error in holding that there is evidence to support clause 8 and in overlooking the Commission's admission in its findings at page 74 of the record which, we submit, justified the use of the testimonials given by the persons referred to in the Court's footnote, and that the Circuit Court's decision in this respect should have been sustained.

V.

The Supreme Court, in Reversing the Lower Court's Ruling as to the Individuals, Respondents Believe, Overlooked the Fact That the Commission's Finding, That the New Corporation Was Organized to Evade Any Order That Might be Issued Against the Original Corporation, Was Not Based on Any Testimony.

Respondents respectfully submit that the Court committed serious error in deciding that respondent Greener was improperly excluded entirely from the operation of the order, and that respondent Ward was excluded from the operation of paragraphs seven and nine of the Commission's order, and in holding that "There was ample support in the testimony" to support the Commission's finding that the individual respondents had organized the Standard Encyclopedia Corporation "for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent, the Standard Education Society" (82 L. Ed. 48, 51).

There is in the record absolutely no testimony to support the Commission's finding as to the purpose of the organization of the new corporation. The only testimony on this important point is that given by Stanford in which, as the Government itself states in its brief (p. 74), he "explained that the new corporation was organized for a legitimate purpose."

Despite the fact that there was no testimony contradicting Stanford, the Commission found as a fact that the new corporation was formed to evade the operation of its order. Inasmuch as there was no other testimony or evidence in the record in this respect, except the testimony of Stanford himself, there was clearly no basis in fact, or even for an inference to support the Commission's finding.

The Court of Appeals correctly disregarded this finding upon which the Supreme Court based its decision since in the opinion of the lower court, the finding had nothing in the record to support it. The statute, Section 5 of the Federal Trade Commission Act, declares that the Commission's findings shall be conclusive only where they are supported by testimony. The finding in question was not conclusive because not supported.

The Supreme Court, in relying upon the Commission's finding, apparently misconstrued the facts and circumstances surrounding the incorporation of the Standard Encyclopedia Corporation. This new company was incorporated under the Illinois eleemosynary corporation statutes with no separate existence apart from the original corporation. It was merely used as a trade department to meet the need for change in the name of the encyclopedia (R. 404, 405). The new company was organized by the three individual respondents, Stanford, Ward and Greener not in their individual capacities, but as officers and employees of the Standard Education Society solely for the latter's benefit and corporate use. Under such conditions, the Commission's finding was clearly unfounded. The utter legal or physical impossibility of using such a corporation to assist the Standard Education Society in evading an order of the Commission seems to have been ignored by the Supreme Court.

Greener, moreover, was merely an employee of the Standard Education Society and his inclusion in the operation of the order was urged by the Government solely on the ground that he happened to be an incorporator of the new corporation. It was not contended that Greener had done anything relative to the practices involved. The lower court therefore properly excluded Greener from the order because he actually was in no way connected with the practices condemned in the order.

The lower court also eliminated Ward from the operation of clauses seven and nine because it was not shown that he was in any way connected with the practices prohibited in these two clauses.

Clearly, since the evasion fears of the Commission were unwarranted, the Supreme Court, it is submitted, erroneously reversed the lower court's rulings as to respondents Greener and Ward.

Conclusion.

For the foregoing reasons respondents respectfully represent and hope that the Court will grant their petition for rehearing in order that the rights of the respondents may not be seriously prejudiced, which include among others, the right to a hearing given by the Federal Trade Commission Act to determine whether they have disobeyed the order of the Commission, as a condition precedent to its enforcement. To deny such hearing deprives respondents of the due process of law provided by statute.

Dated: December, 1937.

Respectfully submitted,

HENRY WARD BEER,
Attorney for Respondents.

I, Henry Ward Beer, counsel for the respondents, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for delay.

HENRY WARD BEER.